No. 13122

United States Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA and R. P. JANDL, as Administrator of the Estate of William F. Leland, Deceased, and C. W. BREAKIRON, Successor Receiver for Atlantic and Pacific Airlines, *Appellants*,

vs.

EAGLE STAR INSURANCE COMPANY, LIMITED; ORION INSURANCE COMPANY, LIMITED; THE DRAKE INSURANCE COMPANY, LIMITED, subscribing underwriting members of Lloyd's, London, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

MACBRIDE, MATTHEWS & HANIFY,
Attorneys for Appellees.

812 Hoge Building,
Seattle 4, Washington.

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STATEMENT OF THE CASE

On January 2, 1949, a DC-3 airplane loaded with a group of 27 Yale students who intended to return to school from their Christmas holidays, and three crew members, crashed in attempting to take off from Boeing Field in Seattle, Washington, at 10:07 P.M. The owner of the airplane, who was operating it as a non-scheduled air carrier, the pilot, co-pilot and eleven of the students were killed in the crash, and most of the other students seriously injured.

The owner had a certificate of insurance with appellees which, when given its plain and intended meaning, insured him against accidental damage to his airplane, caused without his negligence and while he was operating the airplane within the Civil Aeronautics Authority limitations upon it, and against the claims of third parties while he was operating it within the Civil Aeronautics Authority limitations upon it. The Administrator of the owner's estate and other parties, whose rights are derivative from and no greater than those of the owner, brought suit on the certificate to recover for the damage to the airplane and property of a third party caused by the crash. The District Court found that the appellants were not entitled to recover under the clear and explicit terms of the certificate because of the assured's negligence and dismissed their action.

Pertinent Certificate Provisions

Displayed prominently on the face of, and at the beginning of the certificate or policy is the following provision:

> "in consideration of the premium and the statements contained in the Schedule the Underwriters do hereby agree to insure the Assured named in the Schedule against Accident, Loss, Damage and/or Liability, *subject to the terms, conditions and limitations contained herein or endorsed hereon*, as hereinafter set forth in respect of Aircraft described in the Schedule, occurring during the term of this Certificate and/or Policy." (Italics ours)

The "General Conditions" of the certificate are on the same page as the "terms" of the certificate quoted

by appellants. They are displayed as prominently thereon as any other part of the certificate, and are in part as follows:

> "(1) At the commencement of each flight the Aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority. * * *
>
> "(2) The Aircraft shall be operated at all times in accordance with the operations authorized as set forth in the operations record of the Aircraft.
>
> "(3) The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories."

District Court's Findings

Findings of Fact VIII, IX, X and XI, as made by the District Court, are as follows:

> "That on January 2, 1949, at Boeing Field, Seattle, Washington, William F. Leland, the assured named in said policy, caused the acting pilot of said insured airplane to attempt to take said airplane off in flight from said field; that in said attempted take-off, said airplane became partially airborne and thereafter crashed, causing the death of said assured, William F. Leland, the pilot, co-pilot, and a number of the passengers aboard said airplane; that in said attempted take-off, said airplane struck a revetment hanger owned by King County causing damage thereto and that said air-

craft was wrecked and except for small salvage was totally destroyed.

"IX. That William F. Leland, the assured, and the owner of the insured aircraft, personally failed to use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss or damage to the insured aircraft on January 2, 1949, when said aircraft was wrecked in an attempted take-off from Boeing Field in that said Leland negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions and when said insured aircraft had an accumulation of ice, snow and frost on the upper surface of its wings and fuselage and had icicles hanging to its under surfaces, which conditions materially impaired the lifting qualities of its wings. That each and all of said conditions made it extremely unsafe to attempt to fly said aircraft, and as to all of said conditions the said assured owner personally was forwarned and had or should have had personal knowledge thereof.

"X. That all damage caused in said crash to said insured airplane and the revetment hangar located on Boeing Field which said airplane struck at the time of said crash, was proximately caused by the negligence of said Leland and by the failure of said Leland to use due diligence in the operation of said airplane as hereinabove set forth.

"XI. That in operating said airplane in the manner and under the conditions set forth above, the assured violated the express terms and conditions of said contract of insurance."

ARGUMENT IN SUPPORT OF JUDGMENT

The Evidence Is Virtually Uncontradicted and Overwhelmingly Establishes That the Assured Violated the Three Conditions of His Policy of Insurance Above Quoted.

Summary

The evidence conclusively establishes that the assured attempted to take off in his airplane when the weather conditions were such that the law prohibited the take-off. Because of fog, the visibility as reported by the weather bureau at the airport from which the plane attempted to take off was only one-fourth the distance of the minimum required by law for any kind of take-off. The temperature was freezing and the runway was covered with a sheet of ice. Ice crystals were floating in the air for twenty-one minutes prior to the attempted take-off. The record abundantly shows that the assured with a wanton and wilful disregard of likely consequences recklessly attempted to take off when his airplane had an accumulation of ice, snow and frost on the upper surfaces of its wings and fuselage and icicles hanging from the under surfaces of its wings and with a load, without figuring in the weight of the ice and snow, of approximately *28 per cent* in excess of the load it was permitted by law to carry.

The weather at Boeing Field on January 2, 1949, the day of the crash, is shown by defendants' Exhibit A-3, which is a certified copy of the records of the United States Weather Bureau Station at Boeing Field for that day (R. 143-144-145), and the testimony of the employees of the Weather Bureau, Dorothy Sawyer (R. 141 to 156) and Edward Meredith (R. 156 to 162)

stationed at the airport. The temperature was below freezing that day until 12:28 P.M., was slightly above freezing from then until 5:27 P.M., and below freezing thereafter. It was foggy in the morning from 6:00 A. M. until 10:26 A.M., and again in the evening from 6:25 P.M. until midnight. It snowed between 3:58 P.M. and 5:01 P.M. There were ice crystals floating in the air between 9:46 P.M. and 10:18 P.M. Visibility as reported by the Weather Bureau, was ⅛ mile at 9:46 P. M. and 9:58 P.M. and was ¼ mile at 10:04 P.M. and at the time of the crash at 10:07 P.M. There was ice on the metal hand rail and steps outside the weather observers' room (R. 151) and ice was forming on other objects (R. 154-155).

From evidence given by passengers on the plane who survived, it appears that the runway on which the take-off was attempted was covered with a sheet of ice (R. 338-399).

In addition to the evidence concerning visibility in the Weather Bureau report, witnesses, including an observer in the airplane, testified that visibility on the runway itself, from the point of the attempted take-off, was very limited (R. 324 to 326-392).

Sec. 42.36 of Title 14, 1949 Ed., C.F.R., applicable to the assured's operations provides:

> "*Weather minimums; take-off.* No flight shall be started when the ceiling or visibility at the point of departure is less than:
>
> (a) *Contact (visual) flight operations (CFR-VFR)*:
>
> (1) Day. Ceiling 1,000 feet, visibility 1 mile.
>
> (2) Night. Ceiling 1,000 feet, visibility 2 miles.

(b) *Instrument flight operations (IFR)*: The minimums specified in the CAA Flight Information Manual, or as otherwise specified or authorized by the Administrator. In no case shall the ceiling be less than 300 feet or the visibility less than 1 mile."

Sec. 60.79 of Title 14, 1949 Ed., C.F.R. defines "Ground Visibility" as used in the Regulations as follows:

"*Ground visibility.* The average range of vision in the vicinity of an airport as reported by the U. S. Weather Bureau or, if unavailable, by an accredited observer."

49 U.S.C.A. Sec. 560, as in effect at the time of the accident, provides in part as follows:

"(a) It shall be unlawful —

"(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

* * * * * * *

"(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Board or Administrator of Civil Aeronautics under this subchapter."

When these regulations and this statute are applied to the evidence concerning visibility as reported by the weather bureau, it *conclusively appears* that the assured's attempted take-off was made in violation of the law. This violation of law constituted *negligence per se.*

McCoy v. Courtney, 25 Wn.(2d) 956, 172 P.(2d) 596.

It appears from the evidence that the assured's airplane had been standing out in the open unprotected for several days prior to the attempted take-off and that though the assured had wing covers they had not been put on the plane (R. 456). After the snow fall during the late afternoon of January 2, 1949, the plane had at least three inches of snow on it (R. 456). Between 5:30 and 6:00 P.M. and while the temperature was below frezing, the assured had his maintenance man, Mr. Miner, make an attempt to wash the snow off the wings and tail surfaces of the plane with a high pressure hose (R. 451) using cold water (R. 456).

After this attempt at washing the snow off the airplane and at approximately 7:00 P.M., Emmett Flood, an experienced pilot who had been called by the assured to act as a member of the flight crew (R. 185 to 186), arrived at the airport and inspected the airplane. He testified that the plane then had an accumulation of ice and frozen slush on both the top and under surfaces of the wings and four to five inches of snow on the top of the fuselage (R. 186). He said that water had seeped to the under surfaces of the wings and there were icicles hanging from them (R. 186 to 187). Mr. Flood advised the assured, Leland, that he did not think the plane was in a safe condition to fly (R. 190) and after Leland said, "It don't look like too much ice to me," Flood refused to fly the plane (R. 185-191). About 8:30 or 9:00 P.M. (R. 452) the assurred had Mr. Miner, who had hosed the plane and who testified he had no previous experience in removing ice from an airplane (R. 454), take 7½ gallons of alcohol (R. 458), dampen floor mops in it and go over

the upper surfaces of the wings. None of the alcohol was applied to the under surfaces of the wings (R. 458). No attempt was made at any time to remove the ice and snow from the fuselage of the plane (R. 460).

A number of witnesses inspected the plane just prior to the attempted take-off and testified as to its condition with respect to ice at that time. John O. Vineyard, Jr., a friend of Mr. Chavers, who was to pilot the plane, and a pilot who himself had a great amount of experience, went to the airport at the request of Chavers and inspected the airplane in the presence of the assured and in the condition it was in at the time of the attempted take-off (R. 321). He testified that just about every rivet on the under surfaces of the wings had an icicle from ⅛ to ¼ inch long hanging from it and that there were a great many rivets (R. 316 to 317). He did not examine the upper surface of the right wing but did that of the left wing (R. 317) and testified that there were several spots of accumulated ice and heavy frost up to six inches across and eighteen inches long near the leading edge of the wing and several more along the middle of the wing (R. 317). He told Chavers he did not think the plane was in a safe condition to fly (R. 318 to 319).

John W. Kendall, Jr., a passenger on the plane who survived, noticed a sheet of ice on the top surfaces of the wings and the stabilizer and elevator. He moved the elevator up and down and heard ice crackling. He also noticed bumps of ice on the under surfaces of the wings (R. 382).

Donald F. Lynch, another passenger on the plane who survived, noticed there was ice on the fuselage,

bumps of ice on the under surface of the left wing and a sheet of ice on the upper surface of the left wing and that the deicers were covered with a thin sheet of ice (R. 311).

James Wendell Smith, another passenger, observed that the plane was covered with a thin sheet of ice and that there were pieces of ice hanging down from the wings. Some of the ice was near the leading edge of the wing according to Smith, and he saw Charles Belknap chip off a piece of the ice that was hanging down from the wing (R. 398 to 399). He further testified that the prior attempts to remove the ice had been quite meager (R. 399).

Charles S. Belknap, another passenger, testified that he ran his hand along the aileron of the left wing and found ice, like begining icicles, and chipped a piece off. He said the ice on the wings was not a uniform layer, but that there were chunks and patches of ice on the wings, some of which was immediately behind the leading edge of the wings (R. 402-403).

To rebut the testimony of these many observers as to the condition of the airplane, the appellants offered only one witness who testified concerning the ice on the airplane. This was the witness, Miner, the assured's employee, who attempted to remove it. In his testimony he concedes that there were streams of ice left on the under surfaces of the wings (R. 453) and his testimony concerning the upper surfaces was quite equivocal, his statement concerning them being that the upper surfaces "as far as he could see" were free of ice (R. 453). He further testified that no attempt

was made to remove the ice and snow from the fuselage of the plane (R. 460). He admitted the snow and ice on the fuselage was three inches thick (R. 456).

The evidence concerning the overloading of the airplane is not, in any maner, contradicted. The appellants admitted, pursuant to appellee's request therefor (R. 20-53) that the assured's airplane was licensed under Department of Commerce, Civil Aeronautics Authority, Certificate of Airworthiness, Form ACA 1362, which provides:

> "This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the applicable aircraft operation limitations and maintained in accordance with the Civil Aeronautics Authority regulations."

Appellants also admitted (R. 21-53) that under the "Operation Limitations" prescribed on Form ACA-309a by the Civil Aeronautics Authority for the assured's airplane the maximum permitted take-off weight for said airplane, when carrying passengers, was 25,346 pounds. They further admitted (R. 21-53) that the dry weight of the assured's airplane at the time of the attempted take-off, without passengers, baggage, gasoline or lubricating oil, was 17,696 pounds. This means that the *maximum load* which the assured was permitted by law to carry on his airplane, including fuel, was *7,650 pounds.*

Under Title 14, 1949 Ed., C.F.R. Secs. 4a.738-T and 4a.771, standard values are required to be used in determining whether the certificated take-off weight of an airplane is exceeded. These weights, as

prescribed by the latter section are: gasoline — 6 pounds per gallon; lubricating oil—7.5 pounds per gallon, and crew and passengers 170 pounds per person.

Appellants admitted (R. 21-53) that there were thirty persons, including passengers and crew members, aboard the assured's plane at the time of the attempted take-off. Thus, for the purpose of determining whether the take-off weight was exceeded by the assured, the crew and passengers weighed *5,100 pounds.*

The undisputed evidence shows that there were 600 gallons of gasoline on board at the time of the attempted take-off (R. 22-54-329 to 333). Computed as prescribed by the regulation, this weighed *3,600 pounds.*

The lubricating oil tanks on the plane had a capacity of 58 gallons (R. 464) and of course, had some oil in them but the exact amount at the time of the attempted take-off is not shown. The plane was taking off for a flight from Seattle, Washington, to New Haven, Connecticut, and the first point at which it intended to land according to the flight plan (R. 22-54) was Billings, Montana, which the court may judicially notice is 737 air miles from Seattle.

Without taking lubricating oil or baggage or the ice and snow on the plane into consideration, the plane is shown to have a load of *8,700* pounds and to be loaded *1,050 pounds* beyond its maximum permitted take-off load of *7,650 pounds.*

A number of passengers who survived gave evidence on the weight of the baggage. Among the per-

sons so testifying were the two passengers who *loaded the baggage on the plane.* James W. Smith testified (R. 397) that he helped load the baggage—that the baggage compartment was completely filled up—the back part of the plane was filled up and the excess baggage put in the pilot's compartment. He testified that his own baggage weighed 100 pounds and that the average weight of the baggage of all passengers was 60 to 65 pounds per passener. George M. Cole testified that he helped load the baggage on the plane (R. 386) and estimated that it exceeded the forty pounds per person limit that the passengers were supposed to have and that a number of the bags weighed over fifty pounds.

John W. Kendall, Jr., who had worked for an air line handling baggage, estimated (R. 381) that a majority of the baggage exceeded fifty pounds in weight.

The lowest estimate was thus that the baggage weighed *over* forty pounds per person. Figuring it at forty pounds per passenger, the baggage weighed *1,080 pounds.*

The gasoline, crew and passengers, and baggage, thus weighed at least *9,780 pounds, or 2,130 pounds* more than the 7,650 pounds the plane was permitted to carry. The load is thus shown by undisputed evidence to be approximately *28 per cent* more than the assured was allowed by law to carry without considering the ice and snow on the plane or the lubricating oil. Taking off with such a load also constituted *negligence per se.* 49 U.S.C.A. 560.

Summarized, the evidence on overloading is as follows:

Maximum lawful load ..... 7,650 lbs.

Actual load

30 passengers and crew —30 x 170 .....5,100 lbs.

600 gals. gasoline—600x6..3,600

Baggage—*over* 40 lbs. per person 40 x 27 1,080

Lubricating oil—amount not shown .....

Ice and snow—weight not shown .....

At least.....9,780 lbs.

Load in excess of lawful load .....*At least* 2,130 lbs.

A number of experts testified concerning the effect of ice on an airplane and gave their opinions as to the cause of the crash, based on the evidence in the case.

Emmett Flood, an experienced pilot, testified (R. 194 to 197) that an accumulation of frost or ice on the wings of an airplane will destroy the lifting characteristics of the wings and cause them to stall. He stated that this was very, very dangerous in take-off and that, in his experience as a pilot he had found that a *very small amount of frost* will cause difficulty in taking off.

John O. Vineyard, Jr., a thoroughly experienced pilot, testified (R. 319 to 320) that ice or frost on a wing spoils the smooth airflow over the wing and causes a burbling effect in the air which decreases the lift of the wing and makes it stall or quit flying. He

testified (R. 328) that there was enough ice on the left wing (he did not examine the upper surface of the right wing) to materially affect the lifting qualities of the wing. He further testified (R. 327 to 328) that the attempted take-off was a very hazardous operation and that, in his opinion, the icing conditions, overloading and pilot proficiency caused the crash. He explained this further (R. 531 to 533) by testifying that it was his opinion that the ice on the plane got it into trouble in the first instance and that by pilot proficiency he meant that an especially expert or proficient pilot might have been able to get it out of that trouble.

Victor M. Ganzer, a professor of aeronautical engineering, teaching aerodynamics at the University of Washington, testified (R. 346 to 347) that foreign particles on the upper surface of a wing reduces its lifting qualities to a marked extent at take-off; that the greater the plane's load the faster it would have to go in order to take off safely (R. 348) and that icicles on the under surface of a plane's wings would increase the drag (R. 351 to 352). He further testified that the amount of ice, as described in the testimony as being on the assured's airplane would have a *very serious effect on the characteristics of the airplane* during take-off (R. 352-353). He also testified (R. 354) that a very small portion of foreign substance—as little as five per cent to ten percent of the surface of the leading edge of a wing would have a serious effect.

A. Elliott Merrill, a graduate engineer, in charge of all flight testing for the Boeing Airplane Company in Seattle for the past ten years, testified (R. 358) that ice on the wing of an airplane spoils the flight char-

acteristics of the wing by disrupting the smooth air flow under or over the wing—that it reduces the lift of the wing and causes it to stall—that it is more serious at take-off than in subsequent flight. He testified (R. 359) that the assured's attempted take-off was a hazardous undertaking in view of the weather and the ice on the plane. He testified (R. 360) that, in his opinion, the crash was caused by the failure of the pilot to have proper air speed to fly the airplane under the existing conditions of ice on the plane, the weather and the load on the plane, and that in formulating that opinion (R. 367) he considered the possibility of many specific mechanical failures or pilot errors which could be present and have caused such a crash.

Theoretically possible causes of the accident, other than attempting to take off in an overloaded condition with ice on the wings and with poor visibility, were completely dispelled by the evidence presented.

The evidence shows that on December 22, 1948, the assured's airplane was put through what is called a 400-hour inspection, which is the most complete inspection given an airplane under Civil Aeronautics Authority maintenance regulations, and that the airplane and all its instruments were then in *very good* mechanical condition (R. 272 to 274-381). The evidence shows that the plane was flown 22 hours, 40 minutes between then and January 2, 1949 (R. 282) and that on that date, the day of the crash, was given a 25-hour inspection and was then in *very good* mechanical condition (R. 275-282).

After the crash an expert examined the engines and

accessories for the purpose of determining whether there was any evidence of power failure or malfunctioning of the engines and their accessories during the attempted take-off (R. 199) and found no such evidence (R. 199 to 200).

An expert also examined the instruments on the airplane and was not able to find any evidence of failure or malfunctioning of any of the instruments (R. 205).

Many experienced observers heard the attempted take-off and testified that the motors sounded absolutely normal; that the power was applied evenly and that they heard nothing to indicate malfunctioning of the engines (R. 272-166-182 to 183-324 to 325-403).

As heretofore indicated by the findings themselves, the District Court on this evidence (R. 91 to 92) found that the *assured personally* failed to use due diligence and do all things reasonably practicable to avoid loss or damage to the aircraft and that he negligently, carelessly and recklessly caused the attempted take-off under dangerous weather conditions and when the plane had an accumulation of ice, snow and frost on the upper surfaces of its wings and fuselage and had icicles hanging to its under surfaces, which conditions *materially impaired* the lifting qualities of its wings. He found that it was *extremely unsafe* to attempt to fly the plane in view of these conditions and that the damage to the airplane and the revetment hangar on Boeing Field, which the plane struck, was caused by this negligence of the assured and his failure to use due diligence in the operation of his airplane.

We submit, that on this evidence, that no other find-

ings of fact are possible and that if this court were to examine the evidence independently and without giving the trial court's findings the weight required to be given them under Rule 52(a) of the Rules of Civil Procedure, it would have to find that the assured attempted to take off with wanton and wilful disregard of the law and likely consequences, and that such recklessness caused the crash.

This evidence presents an extreme example of exactly the kind of risk the insurers did not wish to undertake and beyond question establishes that the assured has violated General Condition 3 of his policy, which provides, in part, as follows:

> "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured * * * *."

The language of the policy condition is *clear, explicit* and *unambiguous* and surely cannot be said to *need interpretation.* However, similar policy provisions have been before the courts on many occasions and the law is uniformly settled that the effect of such provisions is to except losses caused by the assured's negligence from the risks covered by the policy.

In 29 Am. Jur. 714, Sec. 942, the rule is stated as follows:

> "Recovery on an accident insurance policy is not defeated by the mere fact that negligence of the insured contributed to the injury, unless the policy expressly excepts from the risk accidents due to the negligence of the insured. Where the policy requires the holder to use 'due care,' 'due diligence' or in express terms voids liability for

injuries to which the negligence has contributed, the stipulation is generally treated as calling for the same measure of caution and care that would be required of a reasonably prudent man in like circumstances, the ordinary negligence of the policy holder barring a recovery under the contract."

In an annotation in 29 A.L.R. 714, the rule is stated as follows:

"Where the policy requires the holder to use 'due care,' 'due diligence' or in express terms voids liability for injuries to which his negligence has contributed, the stipulation is generally treated as calling for the same measure of caution and care that would be required of a reasonably prudent man in like circumstances, the ordinary negligence of the policy holder barring a recovery under the contract."

The law of the State of Washington is, of course, for application in this case. The Supreme Court of the State of Washington in the case of *Isaacson Iron Works v. Ocean Acc. etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026, was called upon to interpret a policy of insurance virtually identical to that in the case at bar. The agreement in that case provided as follows:

"To insure the Assured against loss by reason of liability imposed by law upon the Assured for damages, on account of damage to or destruction of property (including loss of use thereof and damage or destruction by fire), as the result of an accident occurring during the prosecution of such work on the specified premises and in accordance with the provisions of Insuring Agreement 5 of said Policy, except as to any operations or exposures which are shown to be excluded elsewhere in this Endorsement, and subject further to all

exclusions, conditions and limitations hereinafter contained."

Condition 1(a) of the policy provided:

"The Assured agrees to use due diligence and exercise reasonable care to avoid doing damage to property of others."

The court held that the effect of this policy was to except losses caused through the negligence of the assured from the coverage of the policy. In the course of the opinion the court said:

"Nowadays many policies are written which by their terms protect the insured against his own negligence. The ordinary automobile indemnity coverage and insurance against fire are of this class. Such policies are not against public policy. Nevertheless, the theory of insurance which protects the insured against damage to a third person resulting from accident occurring in the course of the insured's operations, but which does not protect the insured against the result of his own negligence, is perfectly reasonable. It is for the insurer to determine what insurance he will write for a certain premium, and for one desiring insurance to determine whether or not any given policy affords him protection which he desires, and for which he is willing to pay the premium demanded. It is a matter of balancing risk against cost of protection. As was noted in the case of *Cosgrove v. National Casualty Co.*, *supra*, the insurer has the right to determine what hazards it will assume for a specified consideration.

"It is not argued that any advantage was taken of respondent; the policy and the endorsement or rider were there for anyone to read. Respondent was purchasing a policy protecting it in many

contingencies, and plain and simple language in the policy must be given effect as against either party to the contract. The policy is limited to protection against damage resulting from an accident. The insurer's liability is thus at the very outset considerably limited. Damage made necessary by the nature of the work or by the manner of doing it are also eliminated.

"There is nothing essentially illogical or even unreasonable in a provision to the effect that the insurer shall not be liable in case the insured be guilty of negligence. That provision of the policy must either be given effect according to its plain language, or by judicial interpretation written out entirely. If, in the case at bar, respondent may recover against appellant, it is difficult to imagine what respondent's agreement to exercise reasonable care and use due diligence means. The words are plain and scarcely *susceptible of construction.* To limit the language by judicial construction, appears unreasonable."

The case of *Shoshone Concentrating Co. v. Hamberg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500, was a suit on an insurance policy which provided that competent watchmen should be employed and due diligence used to keep a continuous watch both day and night in and around the plant of the plaintiff when it was idle. The plaintiff employed two watchmen who were foremen in a mill which was from 600 to 1,200 feet distant from the plaintiff's mill, who agreed to watch the plaintiff's mill in addition to their regular duties in the other mill. The court held that the plaintiff had failed to comply with the policy and that its failure voided the policy. In the course of the opinion the court said:

"It is apparent that the plaintiff did not comply with the provisions of the policy above quoted. The policy provides that, whenever the plant is idle 'competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately around said parts of the plant.' Competent men were no doubt employed, but it was understood between them and the plaintiff that they were not to keep a continuous watch both day and night in and immediately around the plant, but that they were to watch intermittently at a distance from the premises, estimated at from six hundred to twelve hundred feet therefrom. The apparent object of the plaintiff was to evade its duties under the policy by making a show of compliance therewith. The diligence exercised was to evade, and not to comply with, the terms of the policy. We think the evidence shows that the men employed were competent watchmen, and that if they had been employed to keep a 'continuous watch * * * in and immediately around' the premises, the property would not have been destroyed. But they were not so employed, and they did not so watch the property. The effect of the testimony of the officers of the plaintiff company was that the men were merely employed to keep an occasional watch from a distance, which they did, and which was the opposite of the duties required by the appellant. This breach of duty avoided the policy. *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, and cases there cited. This was decisive of the case. There was no question of fact for the jury to pass upon, and the court erred in not granting the defendant's motions."

In the case of *Richelieu & O. Nav. Co. v. Boston M.*

Ins. Co., 136 U.S. 408, 10 S. Ct. 934, 34 L. ed. 398, the Supreme Court of the United States was called upon to construe the provisions of a policy which were as follows:

> "Touching the adventures and perils which the said Insurance Company is content to bear and take upon itself by this policy, they are of the lakes * * * excepting all perils, losses, misfortunes or expenses consequent upon and rising from or caused by the following or other legally excluded cases, viz.: * * * imcompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading; stowing and securing the cargo of said vessel; * * *."

The evidence in this case showed that the vessel insured was operating in Canadian waters, had a defective compass and was operating in violation of a Canadian statute requiring it to go at moderate speed in a fog. The vessel ran aground and had no lookout at the time. The court held that the burden was on the plaintiff to show that the damage was covered by the policy, that is, that it occurred without the assured's negligence. In the course of the opinion the court said:

> "In *The Pennsylvania*, 86 U.S. 19 Wall. 125 (22:148) it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. And this was but the statement of the settled rule in collision cases. In this case, in view of the seventh section of the Canadian Statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were

excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. If it appeared that the misconduct or unseaworthiness was cause *sine qua non*, it was an excepted peril, and that, as stated by Judge Brown, 'ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track.' We think there was no error in giving the eleventh instruction asked by the defendant, and forming the subject of the eighteenth assignment of error. And this disposes also of the sixteenth and seventeenth errors assigned, as the burden was upon the plaintiff to show that the stranding and its consequent losses, misfortunes and expenses were caused by perils insured against, and as to the perils consequent upon and arising from or caused by the want of ordinary care and skill in navigating the vessel, the plaintiff was its own insurer."

The case of *Chicago S.S. Lines v. U.S. Lloyds*, 12 F.(2d) 733 (cert. denied in 273 U.S. 698, 47 S. Ct. 94, 71 L. ed. 846) was a suit on an insurance policy providing:

> "This insurance also especially to cover * * * provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager."

From the facts in the case, it appears that in repairing the ship a doubler plate was put on at the direction

of the manager of the assured in such fashion that water could get into the ship under certain circumstances. Water did get into the ship and it sank. The court held that the loss was not covered by the policy. In the course of the opinion the court said:

> "The improper placing of the doubler plate and the failure to calk the same, under the manager's supervision, permitted the water to enter the boat and soak into the rolls of paper on that side, thereby causing the listing and ultimately the sinking. We find that the sinking resulted from want of due diligence on the part of the manager of the owner of the ship, a loss not covered by the policy.
>
> "The negligence of the manager is not excused by the fact, if it be a fact as urged, that all vessels leak more or less, and that much less water than could have been taken care of by the pumps, had it reached them, got into the hold by reason of the manner in which the plate was attached. This is neither reason nor excuse for the carelessness of the manager, whereby more than the inevitable amount of water did get into the hold in such a manner that it was soaked up by the cargo and never reached the pumps."

The case of *Leatham Smith-Putnam Nav. Co. v. National U. F. Ins. Co.*, 96 F.(2d) 923, involved a policy of insurance which provided coverage for loss occasioned through the negligence of the crew of the vessel, providing such loss did not occur from want of due diligence by the owners of the vessel. From the facts in the case it appears that holes were cut in the hatches without permission of the Federal Marine authorities which violated the rules and regulations of the Board of Supervising Inspectors for the Great Lakes.

These rules and regulations have the force and effect of law. The loss was occasioned through water entering through the holes in the hatches. The court held that there was want of due diligence by the owner and that the loss was not covered by the policy. In the course of the opinion the court said:

> "If we are in error in our belief that the contracts never became effective, the evidence does not disclose a loss covered by the policies. They provided that the insurance should cover loss occurring through 'negligence of the master, mariners, engineer or pilot,' provided however, that 'such loss has not resulted from want of due diligence by the owners.' As we have pointed out, the court was justified in concluding that the cause of the loss was the entry of water through 12 of the holes which could not be closed except by gravity and battened down tarpaulins. This defect, as we have seen, was the result of libelants' failure to comply with the requirements constituting a conditon precedent to the grant of permission to make the holes. The continuation of this failure until the time of the loss was want of due diligence upon the part of the owner. Again, irrespective of the burden of proof, the evidence is undisputed that the owner at no time provided means for securing the covers on 12 of the holes other than the force of gravity and battened down tarpaulins. Under the cited clauses of the policy and the findings of the court, of which we approve, justified by the evidence, the loss occurred under the exception of the clause, namely, lack of due diligence by the owners. Consequently there was no liability."

In the case of *Western Assur. Co. v. Shaw*, 11 F.

(2d) 495, the policy of insurance sued upon excepted from the risks covered those caused "from the want of ordinary care and skill in loading and stowing the cargo." From the facts in the case it appears that three 60-ton boilers were placed in the middle of the barge insured without chocks or shoring. As a result the barge listed, the boilers rolled to one side and the barge sank. The court held that the loss was clearly within the exception in the policy. In the course of the opinion the court said:

> "Whether waves from a passing steamer or something else caused the barge to list, the fact is that she did list. The list would have been harmless, if the boilers had remained stationary for the barge would have immediately straightened up, but when the boilers, weighing 180 tons, rolled to her starboard side, she could not do so. The failure, therefore, to shore or chock the boilers as safe and proper loading requires, set in motion a train of consequences—the opening of seams, consequent leaking, the fastening of wire rope or cables to the boilers and wharf—that caused the sinking and occasioned the loss. It seems to us that there is no escape from the conclusion that there was 'want of ordinary care and skill in loading' and that this resulted in an unseaworthy condition of the barge with respect thereto. *Aetna Ins. Co. v. Boon*, 95 U.S. 117, 24 L. ed. 395; *Hagemeyer Trading Co. v. St. Paul Fire & Marine Ins. Co.* (C.C.A.) 266 Fed. 14; *Cary v. Home Ins. Co.*, 139 N.E. 274, 235 N.Y. 296, 1923 A.M.C. 438.
>
> "The policy excepted from the risks insured against all claims arising 'from the want of ordinary care and skill in loading and stowing the

> cargo.' The proofs not only show that the claim does not come within the risks against which the barge was insured, they clearly show that it arises from the want of ordinary care and skill in loading, and comes within the above exception."

The case of *Garcelon v. Comm. Travelers Eastern Acci. Asso.*, 195 Mass. 531, 81 N.E. 201, was a suit brought on an accident policy which contained a stipulation that the insurance company should not be liable "for any injury which the members by the exercise of ordinary care, prudence and foresight might have avoided or prevented or to which the members' own negligence shall have contributed." The court held that when the insured jumped on a moving freight train and was injured, he could not recover under this policy.

The cases of *Morris v. Comm. Travelers Eastern Acci. Asso.*, 98 N.E. 599, and *Nichols v. Comm. Travelers Eastern Acci. Asso.*, 109 N.E. 449, involved an identical policy provision.

The case of *Manter v. Boston Fire Ins. Co.* (N.H.) 35 Atl. (2d) 196, was a suit on a policy which contained a clause that the policy should be voided if the insured should fail to make all reasonable exertions to save and protect the property in case it should be exposed to loss and damage by fire. From the evidence it appeared that the insured made a statement that when the fire came to her attention it was a small soot fire in the chimney and that she could easily have put it out but that she stood by and did nothing. The court held that the policy was voided by the assured's failure to act.

The case of *Standard Life & Acc. Ins. Co. v. Jones*, 10 So. 530, was a suit on a policy which provided:

> "It is also an express condition of the policy that the insured shall at all times use due care and diligence for his personal safety and protection."

The court held that where the insurer plead that the insured failed to use due care by getting off a moving engine with his back towards the direction in which it was going, a replication which did not deny that the assured failed to use due care was insufficient.

Section 3 of the *Harter Act, 46 U.S.C.A. 192*, from which the language of the policy may perhaps have been borrowed, contains language essentially the same as that contained in the insurance policy herein sued upon. This section is, in part, as follows:

> "If the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy * * *."

This section of the act has been before the courts for construction on numerous occasions. The courts have pointed out that diligence and negligence are relative terms and depend on varying circumstances and that due diligence requires such watchful caution and foresight as the circumstances of the particular service demand—that it must be adequate to the occasion. See *Nord-Deutscher Lloyd v. President, etc. of Insurance Co. of N.A.*, 110 Fed. 420, 49 C.C.A. 1, and *Martin v. The Southwark*, 24 S. Ct. 1, 191 U.S. 1, 48 L. ed. 65.

From these many court decisions construing provi-

sions similar to those contained in General Condition 3 of the assured's policy it is apparent that a policy provision requiring an assured to use "due diligence" is the equivalent of a provision requiring him to be free of negligence and that violation of such a condition avoids the policy. Since the assured in the case at bar has been abundantly shown to have violated the law in wilful disregard of the likely consequences in attempting to take off as he did, it follows that he has clearly violated General Condition 3 of his policy and thereby defeated the right to recover for the damage to his airplane.

The evidence heretofore delineated concerning overloading, which is entirely undisputed, and very largely just a matter of mathematical calculation, establishes that the assured has breached General Condition 2 of his policy. General Condition 2 provides:

> "The aircraft shall be operated at all times in accordance with the operations as authorized in the operations record of the aircraft."

The only possible question concerning this condition is as to what is meant by the words "the operations record of the aircraft." This is, of course, a matter of the intention of the parties. It seems perfectly obvious that the parties were referring to the "operation record" referred to in Section 43.1010 of the Civil Air Regulations promulgated by the Civil Aeronautics Board, and reading as follows:

> "*Aircraft Operation Record.* An aircraft for which an airworthiness certificate is currently in effect shall not be operated unless there is attached to such airworthiness certificate an appropriate aircraft operation record prescribed and issued by the Administrator, nor shall such aircraft be

operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. Any change made to the aircraft which effects these limitations shall be made under the supervision of an appropriately rated mechanic or other person authorized by the Administrator and such change shall be noted in the Aircraft Operation Record."

This regulation was in effect for several years in this form and until January 27, 1948, when it was amended (see 13 Fed. Reg. 474) to read as follows:

"(1) *Aircraft operating limitations.* An aircraft for which an airworthiness certificate is currently in effect shall not be operated unless there are available in the aircraft appropriate aircraft operating limitations set forth in a form and manner prescribed by the Administrator, or a current airplane flight manual approved by the Administrator; nor shall such aircraft be operated otherwise than within its prescribed operating limitations."

From these regulations having the force and effect of law, it appears that prior to January 27, 1948, every airplane for which an airworthiness certificate was issued was required to have attached to the certificate an "aircraft operation record" issued by the Administrator and containing limitations on the operation of the plane and that after January 27, 1948, every such plane was required to carry "aircraft operating limitations" as set forth on a form prescribed by the Administrator and containing similar limitations on the operation of the plane.

Appellants admitted (R. 20 to 21-53) that the "aircraft operation record" containing the operation lim-

itations was Department of Commerce, Civil Aeronautics Authority, Form ACA 309 and was replaced by the "operation limitations" Form ACA 309a containing the same limitations.

While the assured's policy was issued a few months after the regulation changed the wording from "operation record" to "operating limitations" and had not been amended to reflect the change, we do not believe there is any possible doubt that the assured knew when reading General Condition 2 that he was supposed to operate the plane in accordance with the limitations prescribed by the Civil Aeronautics Authority when they granted him an airworthiness certificate which the law, as well as the policy, required him to do.

The assured's breach of this condition of his policy defeats the right to recover on both the first and second claims in the amended complaint (R. 25 *et seq.*).

The evidence of overloading also establishes a breach of General Condition 1 in the policy. This provision is in part as follows:

> "*At the commencement* of each flight the Aircraft shall have a valid and current Airworthiness Certificate issued by the Civil Aeronautics Authority." (Italics ours)

The appellants admitted, pursuant to appellees' request (R. 20-53) that the assured's airplane was licensed under Department of Commerce, Civil Aeronautics Authority Certificate of Airworthiness (Form ACA 1362) which provides:

> "This aircraft has been inspected by a representative of the Administrator and is considered airworthy when operated in accordance with the

applicable aircraft operations limitations and maintained in accordance with the Civil Air Regulations."

As heretofore pointed out, the assured attempted to take off with at least *2,130 pounds*, or approximately *28 per cent* more load than he was permitted to carry by the operation limitations (R. 21-53) for his airplane. He thus violated 49 U.S.C.A. 560 and invalidated his Certificate of Airworthiness according to its explicit terms at the commencement of this flight and thereby breached General Condition 1 of his policy.

The breach of this condition by the assured also defeats the right to recover on both the first and second claims in the amended complaint (R. 25, *et seq.*).

It is manifest from the foregoing discussion of the evidence that the assured violated three of the general conditions of his policy of insurance in making the attempted take-off as he did. Thus the only problem remaining in testing the accuracy of the District Court's judgment for appellees is as to what effect the breach of such conditions has as a matter of law.

A Breach of a Condition Material to the Risk Voids a Policy of Insurance.

Appellants make no contention whatsoever in their brief concerning this phase of the case, apparently because the law of the State of Washington is thoroughly settled in accordance with the law generally, that where a condition in an insurance policy is material to the risk and a breach thereof exists at the time of the loss the insurer is relieved of liability on the policy.

Shoshone Concentrating Co. v. Hamberg-Bremen Fire Ins. Co., 64 Wash. 638, 117 Pac. 500;

Smith Lumber Co. v. Netherlands F. & L. Ins. Co., 135 Wash. 547, 238 Pac. 565;

Johnson v. Franklin Ins. Co., 90 Wash. 631, 156 Pac. 567;

Henslin v. H. S. Fire Ins. Co., 152 Wash. 637, 278 Pac. 702;

Ferguson v. Lumbermen's Ins. Co., 45 Wash. 209, 88 Pac. 128;

Clark v. Western Ins. Co., 168 Wash. 366, 12 P.(2d) 408;

Canton Ins. Off. v. Independent Trans. Co. (C.C.A. 9) 217 Fed. 213;

Georgian, etc. v. Glenn Falls Ins. Co., 21 Wn. (2d) 470, 151 P.(2d) 598;

Johnson v. Inland Empire, etc. Ins. Co., 155 Wash. 6, 283 Pac. 177;

Brehm Lbr. Co. v. Svea Ins. Co., 36 Wash. 520, 79 Pac. 34;

Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society (C.C.A. 9) 146 Fed. 695;

Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 462, 14 Sup. Ct. 379, 38 L. ed. 231;

Richardson v. Superior Fire Ins. Co., 192 Wash. 553, 74 P.(2d) 192;

Delaware Ins. Co. of Philadelphia v. Greer, 120 Fed. 916, 57 C.C.A. 188, 61 L.R.A. 137;

Menger v. Inland Empire Ins. Co., 118 Wash. 514, 203 Pac. 934;

McKernan v. North River Ins. Co., 206 Fed. (Wash.) 984;

Neil Bros. Grain Co. v. Hartford Fire Ins. Co. (C.C.A. 9) 1 F.(2d) 904.

It is not possible to intelligently argue, and we do not believe appellants can argue that General Condition 1 requiring the assured to have a valid airworthiness certificate at the commencement of each flight, General Condition 2 requiring him to operate his plane in accordance with the limitations placed on it for reasons of safety by the Civil Aeronautics Authority, and General Condition 3 requiring him to use due diligence and do all things reasonably practicable to avoid loss of or damage to the insured property, do not materially affect the risk which the insurer was called upon to carry. Obviously, each was designed to absolve the insurers in just such a case as the case at bar where the assured flouted the law and threw all precaution to the winds.

Since, under the evidence, a breach of each of these conditions is shown to have existed at the time of the loss, it is apparent under the foregoing authorities that the District Court properly awarded judgment to appellees. The assured's wanton and wilful violations of the law in attempting to take off with an excessive load and insufficient visibility and reckless disregard of

the danger presented by the ice and snow on his plane which breached General Conditions 1, 2 and 3 of his policy defeats the first claim of appellants relating to the airplane itself and the breach of General Conditions 1 and 2 defeats appellants' second claim relating to the damage done to the hangar of King County.

ARGUMENT IN ANSWER TO APPELLANTS

We wish to invite the court's attention to the fact that appellants in putting their brief together have chosen the method of brief writing usually followed by a writer when the law and the facts in the case are against him. In their zeal in presenting their case, they have seized upon, and usually quoted out of context, every single portion of the record in any way favorable to them. They have then enlarged upon this work by assertion and argument not borne out by the record. Because of their method, we do not believe the appellants' brief accurately reflects the true facts in the record and we caution the court to look to the record for the true facts in the case.

Answer to Appellants' Contention That the Certificate Should Be So Construed as to Permit Their Recovery.

Summary

The language of the certificate is plain, clear, explicit and unambiguous. It obviously prevents recovery for damage to the assured's airplane caused by his own negligence. It needs no construction and the court may not enlarge the coverage paid for by rewriting the contract the parties entered into.

From pages 10 to 28 of their brief appellants make the contention that the certificate of insurance in suit protects the insured even though he is guilty of negligence and argue that General Condition 3 does nothing more than prescribe certain duties for the assured in event of damage.

This argument ignores the clear, plain and explicit language of the Condition which provides:

> "The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured, and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the Insured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories."

This condition quite obviously defines a two-fold duty for the assured, *one*, his duty prior to the time the airplane sustains damage and *two*, his duty in the event the aircraft has sustained damage. The provision, which is a single sentence, divides itself naturally and inevitably into two parts, each of which provides for an entirely different factual situation. The first

clause imposes a duty of general application upon the assured at all times by the language "*The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured.*" The second imposes a specific and additional duty "*In the event of the Aircraft sustaining damage*" when it says: "*and in the event of the Aircraft sustaining damage covered by this Certificate and/or Policy, the assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories.*"

Any other or different interpretation renders the verb "avoid" in the first clause language "* * * *avoid* * * * *any loss of or damage to the property hereby insured*" meaningless. Loss or damage is *avoided* before and not after the event. Nor does the use of the verb "diminish" detract, as suggested by appellants, from this interpretation for this defines the duty of the assured when an accident appears inevitable or likely. The assured is required to do all things "*reasonably practicable*" to minimize the damage when an expected accident occurs, *i.e.*, he shall, *if possible*, bring the aircraft down in an open field rather than in an inhabited area, secure cargo, break out fire-fighting and other safety equipment, jettison inflammable cargo if over water, make ready escape doors and hatches and do other things of a similar nature which would be expected to *diminish* the damage caused from the accident which is about to happen.

The dual character of the condition becomes even more apparent when the second clause is considered.

The entire clause begins with and is limited by the words "*in the event of the Aircraft sustaining damage*" which is not contained in the first clause. Only then and in such event is it said that the assured or his agent "*shall forthwith take such steps*" as are required "*to ensure the safety of the damaged aircraft.*" The whole clause is directed at the assured's duty to take positive steps after the insured plane has become a damaged aircraft.

It seems perfectly obvious and crystal clear that the whole object of the first clause of this "*due diligence requirement*" is to impose upon the assured the affirmative duty to take all reasonable and practicable steps to avoid loss of or damage to the insured airplane and to protect the insurer from such wilful negligence and flagrant disregard of duty as was exhibited by the assured in this case.

As said by the Supreme Court of the State of Washington in the case of *Isaacson Iron Works v. Ocean Acc. etc., Corp.*, 191 Wash. 221, 70 P.(2d) 1026, in interpreting an almost identical policy:

> "The words are plain and *scarcely susceptible of construction.* To limit the language by judicial construction, appears unreasonable."

As said by the court in *Delaware Ins. Co. of Philadelphia v. Greer*, 120 Fed. 916, 57 C.C.A. 188, 61 L.R.A. 137 and quoted by this court with approval in *Kentucky-Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Society*, 146 Fed. 695:

> "The obvious meaning of their plain terms is not to be discarded for some curious hidden sense which nothing but the exigency of a hard case and

> the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and popular sense."

We wish to call the court's attention to the fact that appellants in making their argument have cited no case whatsoever construing similar language to that contained in the certificate of insurance in the case at bar.

As pointed out in our argument in support of the judgment, the cases uniformly hold that the effect of such a provision as that contained in the certificate here is to exclude risks caused by the assured's negligence from the coverage of the policy.

We believe the foregoing completely answers appellants' argument. The language of the general condition is clear, plain and unambiguous and *needs no construction.* The court must take it as it finds it. We will proceed, however, to consider appellants' argument more particularly.

Appellants assert that the District Court interpreted the certificate, and particularly General Condition 3, so as to exclude coverage for any loss or damage caused by the negligence of the assured, that an interpretation excluding coverage for negligence would defeat the primary purpose of the certificate and would nullify the third party liability coverage provided by section 2 of the certificate.

From the proceedings in the court below and the record we do not know fully how the District Court

interpreted General Condition 3. We do know that appellees did not contend in the District Court that a breach of General Condition 3 would avoid the liability coverage provided by section 2 of the certificate and with which appellants' second claim in the amended complaint is concerned. Such a contention could not reasonably be made in the face of the plain language of the Condition which says:

> "The assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured."

It is clear from the record that the District Court felt that the assured violated this condition and that this violation defeated the appellants' right to recover for the loss of the airplane which was the property insured and with which appellants' first claim in their amended complaint is concerned. It is also clear that the District Court granted judgment for appellees on appellants' second claim which involved the third party liability coverage. He *could properly*, and must have done so because of the assured's violation of General Conditions 1 and 2 which, as pointed out in our argument in support of the judgment, he is shown by uncontradicted evidence to have violated.

It is true that the District Court, though expressly stating that he was not of the opinion that the plane was not overloaded, made no findings of fact concerning the airplane's taking off with a load in excess of that permitted by law (R. 118). However, such findings were proposed and not made by the District Court after appellants objected to his making such findings

(R. 115 to 119). The findings of fact which the District Court did make, of course amply support the judgment for appellees on appellants' first claim for damage to the airplane.

If the District Court erred in failing to make such findings in support of his judgment for appellees on appellants' second claim, it was because appellants *invited him to so err* and appellants may not complain of or take advantage of the error, if any, in this court.

Smails v. O'Malley, 127 F.(2d) 410;

Missouri K. & T. Ry Co. v. Elliott, 103 Fed. 96 (affirmed 22 S. Ct. 937, 184 U.S. 695, 46 L. ed. 763);

National Loan & Investment Co. v. Rockland Co., 94 Fed. 335;

Haley v. Kilpatrick, 104 Fed. 647;

Platt v. United States, 163 F.(2d) 165;

John B. Stetson Co. v. Stephen L. Stetson Co., Ltd., 133 F.(2d) 129.

Even if appellants were permitted to urge that the District Court erred in failing to make such findings in support of his judgment for appellees on the second claim, it would not follow that this court would have to remand the case for such findings.

As said by the court in the case of *Reinstine v. Rosenfield*, 111 F.(2d) 892:

> "From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

Also, as pointed out in our argument in support of the judgment, the evidence concerning overloading was entirely uncontradicted. It is almost entirely found in the admissions made by appellants pursuant to request made by appellees and in the depositions which were read in the District Court. As said by the court in the case of *McComb v. Utica Knitting Co.*, 164 F.(2d) 670:

> "As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as the trial judge and need not remand for findings by him."

See also:

Burman v. Lenkin Const. Co., 149 F.(2d) 827;

Hazeltine Research v. General Motors Corp., 170 F.(2d) 6;

Sbicca-Del Mac v. Milius Shoe Co., 145 F. (2d) 389;

Moore on Federal Procedure, Sec. 52.06(2);

Cleveland Clinic Foundation v. Humphries, 97 F.(2d) 849.

Appellants next discuss (Brief 14 to 20) general principles governing construction of *ambiguous* policies of insurance and cite authorities that the negligence of the assured does not defeat recovery on a policy *unless* the policy so provides. These authorities obviously have no application to the case at bar since the policy is clear, plain and unambiguous and clearly provides that the assured cannot recover for any damage to his airplane caused through his own negligence.

Appellants argue that an insurance policy should

not be given a construction that will end in an unreasonable or absurd result or that defeats the manifest intention of the parties and the very object and purpose they had in mind in entering into the contract. It would certainly not be absurd or illogical or unreasonable or hard on an insured who was acting as a common carrier and dealing with human cargo to require him to use due diligence to protect the lives of his passengers. Most certainly there is nothing absurd or illogical or unreasonable in a policy which provides insurance against the claims of third parties when the assured operates his airplane within the limitations prescribed for it for reasons of safety by the Civil Aeronautics Authority *irrespective of his negligence* and provides him with insurance for the accidental loss of or damage to his airplane which is not caused by *his own* negligence. That is exactly the insurance afforded by the clear and plain meaning of the certificate in the case at bar.

A policy, of course, could have been written insuring against loss of or damage to the airplane caused by the assured's negligence and insuring him even though he flew the plane in violation of the limitations placed upon it for reasons of safety by the Civil Aeronautics Authority. Whether the insurer would have been willing to write such insurance and whether the insured would have been willing to pay the greatly increased premium such insurance would demand is unknown. The fact is that no such policy was issued and the parties must have intended to make the contract which they did make and which is perfectly reasonable and sensible in every particular.

The assured made similar arguments concerning the general principles governing the construction of an insurance policy to the Supreme Court of Washington in the recent case of *Hamilton Trucking Service, Inc. v. Automobile Insurance Co.*, 139 Wash. Dec. 636, 237 P. (2d) 781. In disposing of the assured's arguments the court said:

> "The respondent, in support of the judgment, cites and relies upon cases from seven states in all of which the courts have decided that, in similarly worded policies, the risk coverage included both collision of the vehicle of conveyance and also collision of the load with another object. We shall not make an analysis of such cases as they follow substantially the same pattern. Among such cases are *Gould Morriss Electric Co. v. Atlantic Fire Insurance Co.*, 229 N.C. 518, 50 S.E.(2d) 295, and *C. & J. Commercial Driveway v. Fidelity & Guaranty Fire Corp.*, 258 Mich. 624, 242 N.W. 789. The courts did not use precisely the same reasoning in arriving at their respective conclusions. In general, they took the position that, even though the language used in the policy then under consideration was not ambiguous, nevertheless the use of certain well-established rules of interpretation and construction of insurance contracts was warranted, and that the intent of the parties to the insurance contract should be ascertained. The thought was expressed that manifestly the purpose of the insurer was to protect the insured against loss or damage to his property while being transported, and with such thought as a foundation the theories advanced were that the risk of coverage provision was capable of two interpretations and the one most favorable to the insured should be adopted; that inasmuch as the policy

was prepared by the insurer it should be construed against it; that to confine the risk coverage to collision of the vehicle with some object would reach an absurd result and one not contemplated by the parties; that the word 'collision' was intended as descriptive of the way and means of sustaining loss rather than a limitation of liability.

"We have not adopted the lines of reasoning found in the cases cited by respondents in order to determine the intent of the parties, or what they may or must have contemplated when making an insurance contract with reference to the extent of the risk coverage when it was clear that the words were used in their ordinary sense or meaning, nor when the language used was plain and unambiguous. We have resorted to familiar rules of interpretation of words and construction of language used in such contracts in order to ascertain the intent of the parties, or what they contemplated, when it appeared that certain words were used in a special or restricted sense, were susceptible of different meanings according to the way in which they were used, or when the language used was of doubtful import or ambiguous.

"We have taken the position in such matters that a rule of construction should not be permitted to have the effect to make a plain agreement ambiguous and then construe it in favor of the insured. Our many cases on the subject of interpretation and construction of insurance contracts may be found in volume 7 of the Washington Digest and Cumulative Annual, Insurance, Key No. 146. We see no occasion to engage in a review of, or to quote from them. The words of the part of the policy under consideration must be accorded their ordinary meaning. The language used is

> plain and unambiguous. There is nothing to interpret or construe. We cannot avoid feeling as we read the cases cited by respondent that those courts have created ambiguities where none existed and have then used rules of construction to determine the intent of the parties and what they must have contemplated, thus enlarging the risk coverage of the insurance policies under consideration."

Appellants next argue (Brief 21 to 29) that the purpose of General Condition 3 is limited to requiring the assured to mitigate damages in the event the aircraft is damaged. They recognize that it is not so limited unless the plain and unequivocal language of the condition is rewritten, which they proceed to do, from pages 25 to 29 of their brief. To shift the "and" separating the two clauses in this condition as suggested by appellants would make the condition awkward, unnatural, and in effect say the same thing twice. The court may not rewrite the contract of the parties but must take it as it finds it.

The appellants assert that the condition so limited would serve a useful purpose since it is common knowledge that aircraft often sustain damage which grounds them in places where they would be subject to further damage. It is also common knowledge that non-scheduled air carriers are notoriously reckless and careless and the condition *as written* serves not only the useful purpose mentioned by appellants but the further useful purpose of protecting the insurer against claims for accidental damage to the airplane caused by the negligence of a careless and reckless operator.

Appellants comment upon the fact that the word "negligence" is not used in the condition. As will be seen from the argument in support of the judgment, the courts universally regard a provision requiring that "the assured shall use due diligence" as nothing more than a positive way of saying that he should not be guilty of negligence. This is the natural way to state it in advance as in a policy of insurance. We also note that appellants in rewriting the policy (Brief 28 to 29) were not able to make it meaningful without also stating the duty to use due care positively before repeating it negatively.

Answer to Appellants' Contention That Appellees Are Liable Even Though Policy Excepts Losses Caused by the Assured's Negligence from the Coverage.

Summary

The evidence overwhelmingly establishes that the assured, though several times forewarned of the probable consequences, recklessly attempted to take off with a dangerous accumulation of ice, snow and frost upon his airplane. The wholly uncontroverted evidence establishes that the assured flouted and violated the law in attempting to take off with a large overload and grossly inadequate visibility.

From pages 28 to 56 of their brief appellants advance the contention that appellees are liable in this case even if the policy excepts losses caused by the assured's negligence from the coverage.

Appellants assert (p. 29) that an insurance company which seeks to avoid a policy of insurance for breach of condition has the burden of establishing such

breach by *clear and convincing* evidence. This is but one of the many examples of exaggerated inflamatory argument in appellants' brief which could be pointed out. The text which they quote on page 30 in support of their argument doesn't refer to who has the burden of proof and uses the term "preponderance" rather than "clear and convincing."

We do not believe that the question of whether the insurer has the burden of showing a breach of condition or the assured has the burden of showing that a loss has occurred which is within the terms and conditions of his policy is of any significance in this case in view of the undisputed evidence in the record. However, we do wish to point out that many courts, including the Supreme Court of Washington, and the Supreme Court of the United States, take the view that the assured has the burden of proving that he has sustained a loss within the terms and conditions of his policy.

Isaacson Iron Works v. Ocean Acc. etc. Corp., 181 Wash. 221, 70 P.(2d) 1026;

Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U.S. 408, 10 S. Ct. 934, 34 L. ed. 398.

Appellants assert (p. 30) that the portion of Finding IX of the District Court, which they quote, was the only thing found by the District Court as to the cause of the crash. We refer the court to pages 3 and 4 of this brief for the *complete* text of Findings IX and X on this subject.

Appellants then refer (p. 31) to the uncontradicted evidence concerning the weather conditions and visi-

bility at the airport as reported by the Weather Bureau. We fail to see how appellants can take comfort from this evidence. As pointed out in our argument in support of the judgment, this evidence establishes conclusively that the assured had visibility of only one-eighth the distance required by law for a contact take-off, and one-fourth the distance required by law for an instrument take-off, and his violation of the law by attempting to take off under such circumstances constitutes *negligence per se.*

Sec. 60.79, Title 14, 1949 Ed. C.F.R.;

49 U.S.C.A. 560;

McCoy v. Courtney, 25 Wn.(2d) 956, 172 P. (2d) 596.

Appellants then refer to the fact (p. 31 to 32) that the court excluded evidence of other take-offs. This ruling was, of course, proper as we shall see more fully later herein. Weather conditions were shown to be very variable (R. 143-144-145, 154-383-388-392-399-400) on the evening in question. Had such evidence been admitted it would have been of no value without going into all the collateral circumstances and conditions surrounding the flights and the fact that the last pilot to take off was fined $300.00 (R. 515) for taking off under weather conditions where take-off was not permitted.

Appellants next object (p. 32) to the general language of the District Court's finding that the assured "negligently, carelessly and recklessly caused the acting pilot of the insured aircraft to attempt to take off in flight in dangerous weather conditions" and that

such negligence was the proximate cause of the crash and the damage. The court could, perhaps, have been more explicit but the evidence concerning the temperature, visibility, ice crystals floating in the air and ice on the runway was not in dispute and thus the court could conveniently conclude that the combined conditions were "dangerous." Appellants assert that it is common knowledge that planes often fly in bad weather and have equipment to meet such conditions. The record doesn't establish the conditions under which airplanes generally try to fly or take off or how they are equipped, or that they endeavor to take off in violation of law. It does establish, however, beyond a peradventure of a doubt, as the finding by the District Court above quoted indicates, that the assured in this case with reckless disregard for human life, attempted to take off when the visibility was not such as was required by law for him to attempt to take off and when other weather conditions were unfavorable to take-off.

Appellants next assert that the "*veering* to the left edge of the runway" is a unique feature of the crash since it is common knowledge that the pilot of any plane attempts to proceed in a straight line down a runway.

The only testimony concerning the tracks left by the airplane given by any one in the case was given by appellant's witness Mugge (R. 520 to 523). His recollection was not very good and his testimony was even more equivocal than that of several witnesses whose testimony has been criticized by appellants. However, we believe, as we do of the others' testimony, that his best recollection of the facts was given and a portion

of his testimony (there was no testimony in the case as to the width of the runway) was as follows (R. 520-521):

"Q. (By Mr. Cluck): Will you briefly describe the tracks as you observed them on the runway?

A. Yes. As I recall, the tracks were picked up from the end of the runway to a point about one thousand feet down the runway in a comparatively straight line. From that point they assumed a *gentle curve* towards the east side of the runway, or the left hand side, leaving the runway at a point, if I remember right, about 1800 feet from the end of the runway.

Q. Without reference to detail, Mr .Mugge, the tracks *described a gentle curve*, did they, to the left of the runway, is that correct?

A. Will you say that again?

Q. I say without going into a lot of detail, did they describe a curve to the left prior to the leaving of the runway?

A. That is right.

* * * * * * *

A. I don't recall that the track actually went to the edge of the runway. My memory isn't that good, but it seems to me there was a one wheel track. Whether it was intermittent or solid, I don't quite recall at this time."

We do not see how appellants can stretch this testimoney into "*veering*" but when the action of the plane as described by the witness is coupled with the undisputed testimony concerning visibility, we submit that one must *inevitably conclude*, as the District Court apparently did, that the pilot *couldn't see where he was going* and gently but surely curved his plane in

a direction heading off the runway into the path of structures when he had over a mile of clear runway ahead had he just been able to see it.

Appellants spend the next six pages of their brief (pp. 33 to 39) distorting the testimony of John O. Vineyard, Jr., one of the principal eye witnesses, and a wholly disinterested one, to the events leading up to the crash and the crash itself. We think it will take a complete reading of his testimony which is found in the record at pages 314 to 341 and 528 to 533, to clear up the distortion and we invite the court to do so. Some of the distortions follow. At page 34 appellants quote Mr. Vineyard's testimony as follows:

> "Q. What do you consider caused the crash?
>
> A. Well, from all the evidence and what I examined myself, I say between pilot proficiency and the icing conditions and possibly the overloading of the airplane that caused the crash."

They then assert "The two matters other than icing, referred to in the first of his statements, above, must be disregarded. Testimony to the effect that a cause was 'possibly' overloading merits no weight as proof of the actual cause of the accident." Appellants neglected to quote the testimony which immediately followed the question and answer set forth above. This was (R. 328):

> "MR. CLUCK: What was the first one you mentioned?
>
> THE WITNESS: Pilot proficiency.
>
> THE COURT: What of those things did cause the crash, in your opinion, if you have an opinion?

THE WITNESS: Well, sir, the combination of all, I think, are equally to blame for it. That is my opinion."

At page 35 appellants assert that Vineyard was conscious of the necessity of explaining why the airplane "*veered*" to the left and advanced the theory that the left wing stalled because of a larger amount of ice upon it than upon the right wing. Vineyard did not at any time advance this or any other *theories.* He stated right from the start that he did not examine the upper surface of the right wing and did not know how much ice was upon it. He did testify as an expert (R. 320) that if an airplane took off with more ice on one wing than the other that the one that had more ice on it would stall sooner than the other.

Appellants assert at page 36, and again at page 38, that Vineyard testified it would take "ice in appreciable quantities" and "sizeable quantities of *rough* ice" to cause a wing to stall whereas his testimony referred to was (R. 319):

"Q. Will you explain briefly what it is that makes an airplane fly and the importance of a smooth surface on the wing of an airplane in connection with its lifting qualities?

A. The wing of an airplane is an air foil, so designed to cause lift as it is pulled through the air, and the skin on the wing of the airplane is made as smooth as possible to cause a smooth flow of air over the wing, and much obstruction on the skin will cause a burbling effect of the air passing over the air foil to where it will disturb and make the wing less efficient than it would if it had a smooth surface to flow over, and cause it

to be less efficient to have lift to make the airplane fly."

At page 39 appellants quote a portion of Mr. Vineyard's testimony as follows:

"Q. How many spots would you say there were on the top of the left wing in the places you have indicated?

A. Probably four or five.

Q. What percentage of the surface of the left wing would you say was covered, to the best of your judgment, with the spots of rough ice and frost?

"A. That is very hard to put it in percentage, because I didn't make that close an inspection of how much ice covered the wing. From standing on the ground and feeling as far as I could, and from the lights of the car shining up on the wing, I could just see the tops of rough places that I observed. I did not examine the wing on top like I did on the bottom."

They neglected to quote what followed immediately (R. 318).

"Q. Was Mr. Leland there at the airport that night?

A. Yes, he was there at the airplane and he was standing near when we were examining the wings.

Q. In your opinion, Mr. Vineyard, was this airplane in a safe condition to take off at the time you examined it?

A. I can answer that by saying that I would not have tried to fly it off under its present condition, icing condition.

Q. What is your opinion as to whether or not it was safe for some one else to fly it off?

A. No, sir, I did not think it was safe to be taken out."

They also neglected quoting his testimony as follows (R. 328):

"Q. In your opinion, was there enough ice on the left wing to materially affect the lifting qualities of the wing?

A. Yes, sir."

At page 37, appellants, in discussing the examination of the airplane made by Vineyard, state that he "went over to the airplane in the dark, where it was parked at the end of the runway prior to take-off." The record shows (R. 315) that the plane "was on the west side of the field, sitting on a large cement apron in front of Mr. Doug Miner's maintenance place" when he examined it. He was not without light as intimated by appellants but had his car placed in such position that the lights were directed upon the left wing (R. 336-318). Appellants imply by an alleged direct quotation, which is not such a quotation, that Vineyard went over only about twenty inches near the wing tip of the under surfaces of the wings, whereas (R. 316-317-335) he examined all the under surfaces *except* the twenty inches near the wing tips.

At page 41 appellants assert that Vineyard and Flood were the only witnesses to testify concerning the ice on the airplane and at page 42 that only Vineyard testified concerning it. As pointed out in the argument in support of the judgment, several other witnesses testified concerning the ice.

Again at pages 41 and 42 appellants dispose of the expert testimony of Emmett Flood by an out-of-context quotation. We invite the court to read his entire testimony (R. 184 to 197).

At page 42 appellants question the qualifications of Professor Ganzer by asserting that he had made no experiments with the DC-3 type of aircraft involved in this case. The record (R. 355) upon which this assertion is based is as follows:

> "Q. Did you make any experiments with DC-3 type aircraft?
>
> A. We have made experiments with DC-3 type wings, the air foil section itself, but not with DC-3 type airplanes, that I have been personally acquainted with, at any rate, but with the type, their wing section, yes.
>
> Q. But you made no experiment with the aircraft itself?
>
> A. Not with the aircraft."

At page 43 appellants assert that Professor Ganzer testified that icicles on the under surface of the wings "would not be very serious." The record (R. 351-352) upon which this assertion is based is as follows:

> "A. Well, in my opinion, with regard to the icicles, first I would say that such a condition would not be very serious as far as the *lift* of the wing is concerned, on the under surface of the wing, that is. The icicles on the under surface of the wing would increase the *drag* of the airplane, would require more power to be used to get up to a certain speed to take off, and also more power to fly, but *probably* would not have a very serious effect on the lift."

This is one "probably" that appellants didn't point out.

At page 44 appellants assert that Mr. Merrill's connection with the accident "was confined to sitting in court and reviewing testimony during the course of one afternoon" whereas he testified (R. 361):

> "I have read about it and also talked to some of the people involved the next morning."

Appellants also use the out-of-context quotation method on Mr. Merrill (pp. 44 to 45). It is clear from his testimony as a whole (R. 357 to 367) that he believed that the crash was caused by the ice on the airplane, the weather conditions and the overloading. He, as an engineer, of course, recognized the obvious fact in his testimony that the pilot "did not have a proper air speed to fly the airplane under the existing conditions," that you could fly a house through the air if you got it up to the proper air speed.

From the testimony of Vineyard, Flood, Ganzer and Merrill, all experts in the field, it is crystal clear that ice and frost on the wings of an airplane will radically change the lift and drag characteristics of the wings and thus critically impair the ability of a plane to get off the ground and fly.

At page 48 appellants assert that "data as to weight of the baggage was not available" and intimate that the only testimony concerning the weight of the baggage was given by students who had seen but not lifted it. The fact is that the two passengers *who loaded the baggage* testified as to its weight (R. 397-386).

From pages 49 to 52 appellants argue that there

was no evidence that fog caused the accident. They assert at p. 49 that not a single witness "testified that in his opinion fog was the cause of the crash," after just four pages previously having quoted Mr. Merrill's opinion that the weather conditions were one of the causes of the crash. It would, of course, not have been necessary for appellants to have offered opinion evidence as to this phase of the case since any layman could draw a proper conclusion from the physical facts in evidence which showed the plane curved gently towards the left in a direction heading off the runway after the first thousand feet of its take-off run and during the next 800 feet thereof, with over a mile of clear runway ahead, and the undisputed evidence concerning the visibility at the time of the take-off.

As appellants state, the visibility as reported by the Weather Bureau at the time of the take-off was one-quarter mile. One of the passengers in the airplane (R. 392) testified that the visibility at the time and place of the attempted take-off from the north end of the runway was not too good. At the time of the attempted take-off Miner and Vineyard (R. 322) were within 200 feet of the airplane at the north end of the runway to the west, and were unable to see the airplane itself because of the fog, according to Vineyard. Neither were they able to see the runway lights at that distance of 200 feet.

Appellants state that it is the visibility to the pilot at the place from where he was ready to take off that would be important in determining whether restricted visibility had anything to do with the crash. They then imply that Mr. Miner testified concerning the

pilot's visibility from the point of the attempted take-off by quoting his testimony concerning what the visibility was twenty minutes before the attempted take-off from the point where the passengers were loaded. This was before the airplane ever taxied out to the end of the runway.

Appellants did not ask the assured's employee Miner concerning visibility from the end of the runway where the plane actually attempted to take off but were content to rest upon Mr. Vineyard's testimony. Vineyard and Miner were sitting beside each other in Vineyard's automobile. Their failure to question Miner must have been because his testimony would have accorded with Vineyard's.

The testimony which appellants quoted, coming from Mr. Miner, was to the effect that from the cockpit of the airplane you could see over the top of the fog and see lights around and over the city. If this testimony had related to the time of take-off, it would then be up to appellants to explain their theory a little more fully as to just how it is a pilot is better able to keep a plane on a runway when he can see over the top of fog which is lying between his position in the cockpit and the runway than he can when the fog reaches up over the cockpit.

The undisputed testimony is that the visibility, as reported by the Weather Bureau, was one-quarter mile which means that for the purpose of determining whether the assured *was permitted by law to take off* that he was not so permitted. The undisputed testimony is that at the actual point of the attempted take-off one could not see the airplane or the runway lights

two hundred feet away and appellants had a witness to dispute this testimony had they chosen to do so, or if he would have given any different testimony. The undisputed testimony shows that the assured gently ran his airplane in a direction leading off the runway to the left into the path of structures when he had over a mile of clear runway ahead. We submit that the most logical and in fact, *inevitable*, explanation of this action is that he *could not see whether he was on the runway.*

The appellants argue from pages 52 to 54 that the evidence supported alternate possible causes of the crash but fail to point out any evidence whatsoever in support of this contention. They content themselves with criticizing the form of hypothetical questions asked by appellees of expert witnesses. We submit that the record shows that these questions were based entirely and completely upon competent evidence in the case and religiously followed that evidence. As we have pointed out in our argument in support of the judgment, the theoretically possible causes of the accident are shown to have not occurred.

From pages 54 to 56 appellants argue that any finding of negligence must be based upon the doctrine of *res ipsa loquitur* and quote from an opinion of the Superior Court of King County in the case of the County against the assured's estate for damage to the County's revetment hangar. The record, of course, does not show what evidence was before the King County court. It does show that we objected to the admission of this memorandum opinion (R. 112-113). We submit that there was no basis for the admission of this opinion

in evidence and that the court should have excluded it and that this court should not consider it. However, if the court is interested in considering the findings of other tribunals in connection with this accident, we call attention to the fact that we offered in evidence the report of the Civil Aeronautics Board investigation and findings concerning this accident (R. 293 to 308) which shows what facts were before that body. While the District Court did not receive this report in evidence we submit that he erred in rejecting it, in view of the provisions of *49 U.S.C.A. Sec. 425*, and that it may, therefore, be considered by this court.

The Civil Aeronautics Board found, after reviewing the evidence gleaned by its complete investigation (R. 305), that the assured loaded his airplane beyond the maximum permitted take-off weight; that at the time of the take-off ice covered the bottom surfaces of both wings and there were patches of ice and frost on the top surface of the left wing; that at the time of the attempted take-off the official weather at Boeing Field was visibility restricted to one-quarter of a mile; that there was no indication of any mechanical or structural failure in the aircraft or any of its components and that the probable cause (the statute requires the Civil Aeronautics Board to find the probable cause) of the accident was the attempt to take off in an airplane which had formations of ice and frost on the surfaces of its wings. It thus appears that the Civil Aeronautics Board found that the assured was reckless in the same particulars as the District Court did in this case.

We submit that by direct, uncontroverted evidence

the assured is shown to have been negligent and by such evidence his negligence is shown to have been the proximate cause of the damage to the airplane owned by him. However, we wish to invite the attention of the court to the fact that it is well settled law that neither negligence nor proximate cause need be shown by direct evidence. Both negligence and the casual connection may be shown by facts and circumstances which, in the light of ordinary experience reasonably suggest that a person was negligent in the manner charged and that such negligence operated proximately to produce the injury.

Johnson v. Griffiths S.S. Co., 150 F.(2d) 224;

Nelson v. West Coast Dairy Co., 5 Wn.(2d) 284, 105 P.(2d) 76;

Frescoln v. Puget Sound Traction Light & Power Co., 90 Wash. 59, 159 Pac. 395.

Answer to Appellants' Contention That the Court Erred in Excluding Evidence and Rejecting Appellants' Offer of Proof.

The question objected to concerning which the offer of proof was made (R. 482) was first propounded to the witness Wiley on cross-examination during appellees' case in chief (R. 176) and repeated later during appellants' rebuttal (R. 476). The objection at the time the question was first propounded was that the testimony had no probative value due to remoteness in time and tended to raise collateral issues (R. 176-177). This objection was then overruled but later objection by appellees was sustained when the witness was referred to notes in order to be able to answer the ques-

tion which he said was testimmony given before the C.A.B. (R. 178). This kind of ruling by the court was adhered to throughout the trial and was *first made by the court* at the *request of appellants* when appellees called their first witness (R. 150-151). The appellants will not be heard to complain of the court's error, if any, which they invited.

Furthermore, the court undoubtedly ruled correctly (R. 468) when appellants waited until their rebuttal to recall Wiley and again ask the same question, when he said:

> "I think permission ought to have been obtained expressly to save this for rebuttal, in view of the fact that it came up in connection with cross-examination of this witness before."

The witness Crooks, on appellants' rebuttal, was also asked this same question (R. 473) and appellees objected on remoteness again and when it appeared that the same question was involved as with the question asked Wiley, the question was reserved until appellants could check the objection made and sustained to Wiley's question when it was first asked, concerning which they had a different recollection than the record showed, by referring to the earlier record.

After the earlier record of Wiley's testimony was reviewed (R. 476-479) the court remarked (R. 480):

> "If you had at the next recess, or asked the opportunity between calling of witnesses to examine the notes that the witness referred to at the time at that moment you could have decided whether or not you wished to proceed further to inquire of the witness, and then if that had been done, it might not have involved the defendants in pos-

> sibly recalling other witnesses who have since been excused. I am certain of one thing and that is that this subject should not be gone into without the opportunity afforded to the defendants to recall any witness that they previously excused for the purpose of inquiring from him concerning these facts about which you propose to inquire here. If those witnesses are out of reach, it is obviously placing the defendants in an unfair position."

As noted by the court appellants had had ample earlier opportunity to review the notes the witness referred to and see whether they desired to cross-examine further but had not done so.

Because of the court's views, the offer of proof was made (R. 482) and appellees objected thereto (R. 483 to 487) on the ground that it was not proper rebuttal; that the testimony had no probative value because of remoteness; that a portion of the offered testimony was hearsay, and that it was incompetent, irrelevant and immaterial. The court sustained *all of these objections* (R. 487) apparently changing his earlier view as to remoteness. A portion of the offered evidence was without question, hearsay.

The law is well settled that the absence of other accidents at the place of an alleged defect may not be shown for the reason that such evidence is not only held to raise collateral issues but to have no reasonable tendency to prove that the place traversed was free from danger.

Anderson v. Taft, 20 R.I. 362, 39 Atl. 191;

Fox Tucson Theatres v. Lindsey, 46 Ariz. 388, 56 P.(2d) 1843;

Thompson v. B. F. Goodrich Co., 48 Cal. App.(2d) 723, 120 P.(2d) 693;;

City of Oakland v. Pacific Gas & Elec. Co., 47 Cal. App.(2d) 144, 118 P.(2d) 330;

Lucia v. Meeck, 68 Vt. 175, 34 Atl. 695;

Barlow v. Salt Lake & U.R. Co., 57 Utah, 312, 194 Pac. 665;

Marvin v. City of New Bedford, 158 Mass. 464, 33 N.E. 605;

Mobile and O.R. Co. v. Vallowe, 214 Ill. 124, 73 N.E. 416.

This rule is especially applicable to the facts of this case where the weather conditions were very variable and the assured has been proved to be guilty of negligence in attempting to take off with such an accumulation of ice, snow and frost on the airplane as to make it extremely unsafe to attempt to fly it, in attempting to take off when visibility was such that he was not permitted by law to attempt to take off and in attempting to take off with a load at least *28 per cent* in excess of that he was permitted by law to carry and where none of these acts of negligence were committed by the two other planes according to the offer of proof. In fact, we do not know from the offer of proof what kind of planes the other planes were or whether they bore any similarity whatsoever to the assured's DC-3.

In view of the foregoing, we submit that the evidence was properly rejected by the court on each of the

grounds urged and sustained by the court. Furthermore, even if it could be said that it should have been admitted, its rejection was most certainly harmless error as defined by *Rule 61 of the Rules of Civil Procedure.*

CONCLUSION

In conclusion we respectfully submit that appellees issued a certificate of insurance which clearly, plainly and unambiguously insured the owner of an airplane while he was operating the plane within the limitations prescribed for it by the Civil Aeronautics Authority against accidental loss or damage to his airplane caused through *no negligence of his own* and also against the claims of third parties irrespective of his negligence. The premium charged the assured was based upon the risks assumed by appellees.

As previously pointed out, the uncontradicted evidence establishes with certainty that the assured in *flagrant disregard of the lives and safety of his passengers* took off with a load at least *28 per cent* in excess of that he was permitted by law to carry without figuring in the weight of the ice and snow on the airplane. This not only violated the law but also violated the limitations prescribed for his airplane by the Civil Aeronautics Authority and was *negligence per se.* The uncontradicted evidence also establishes that the assured's take-off violated the law and was thus *negligence per se* in that visibility was too limited for him to take off lawfully and other weather conditions were unfavorable. The evidence further establishes that the assured attempted to take off with such a quantity

of ice, snow and frost upon his airplane and particularly the wings thereof as to make it extremely unsafe to attempt to fly the airplane.

In view of the assured's flagrant disregard of the law and reckless abandonment of all caution, we submit that the insurers are entitled to have their contract *read as it was written* and have the judgment of this court affirming the District Court's judgment.

Respectfully submitted,

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Attorneys for Appellees.